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Evidence -- Hearsay -- Admissibility of Hospital Records

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III. Acts Confirming Property to Married Women.⁴

Be it enacted that A. B. of Wilkes County, wife of C. D., be, and she is hereby entitled to hold, possess and enjoy, in her sole right, any estate, either real or personal, which she [now has or] may hereafter acquire, by her own industry, purchase, gift or otherwise, in as full and ample a manner as if she had never been married to her said husband; and she is hereby authorized to prosecute or defend any suit in her own name, in any court within this State, in the same manner as if she had never been married.

Evidence—Hearsay—Admissibility of Hospital Records

In *Sims v. Charlotte Liberty Mut. Ins. Co.*¹ the defendant sought to introduce in evidence its insured's hospital record in an attempt to show that she had made certain misrepresentations about her health when applying for a life insurance policy. The North Carolina Supreme Court held that although records of this type are hearsay, they are generally admissible, being within the business records exception to the hearsay rule. However, admission of the particular record involved was denied on the grounds that it contained privileged communications between physician and patient.²

At common law, business records offered to prove the facts recorded therein were admissible upon a showing that the records were made in the regular course of business, with the personal knowledge of the entrant, at or near the time of the transaction

⁴ See, e.g., N.C. Sess. Laws 1827, ch. 71. The bracketed words in this form were not always present. The first of these acts was passed in 1794. It recited that the husband had deserted the wife and was living in adultery. N.C. Sess. Laws 1794, ch. 101. The number of women named in the acts varied from one to twenty-two. In at least one a man was included. N.C. Sess. Laws 1808, ch. 115.

¹ 257 N.C. 32, 125 S.E.2d 326 (1962).

² N.C. GEN. STAT. § 8-53 (1953), provides "no person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician or to do any act for him as a surgeon: Provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice." The court in the instant case held that this privilege extends to hospital records which contain entries made by physicians, or under their direction, pertaining to information obtained while treating the patient in a professional capacity. 257 N.C. at 38, 125 S.E.2d at 331 (1962).

recorded, and that the entrant was dead or otherwise not available as a witness.³

Hospital records have been admitted in evidence under the same conditions as business records,⁴ but the common law requirement that each person making an entry in the record must be present as a witness or have his non-availability accounted for, has often resulted in the record's exclusion.⁵ With the advent of modern hospital practices, where any number of physicians, nurses, and interns are involved in caring for a patient, the entrants, if identifiable at all are likely to be so numerous as to make their presence in court impractical. Even if each entrant were called to testify, he could hardly be expected to recall the facts upon which any one entry was based, and in the end, he himself would have to rely on the record.⁶ Therefore, it seems that the presence of the entrant could add little or nothing to what the record itself contains.⁷ The absence of the entrant should not impugn the reliability of the record, for the systematic recording of hospital records, the lack of motive for their falsification, and the fact that a patient's life may depend upon their accuracy are adequate assurances of their trustworthiness.⁸

A few courts, recognizing the reliability of hospital records, and the impracticality of calling each entrant, have allowed undue inconvenience to be an adequate reason for the entrant's absence, provided that someone familiar with the records verifies them and testifies that they were made in the regular course of business.⁹

³ *Ward v. Music*, 257 S.W.2d 516 (Ky. 1953); *Missouri Forged Tool Co. v. St. Louis Car Co.*, 205 S.W.2d 298 (Mo. App. 1947) (record excluded because entrant not shown to have been unavailable); *Lebrun v. Boston & Me. R.R.*, 83 N.H. 293, 142 Atl. 128 (1928); *Jameson v. First Sav. Bank & Trust Co.*, 40 N.M. 133, 55 P.2d 743 (1936); *Mercer v. Denne* [1905] 2 Ch. 538; *Smith v. Blakey*, L.R. 2 Q.B. 326 (1867).

⁴ *E.g.*, *Grossman v. Delaware Elec. Power Co.*, 34 Del. 521, 155 Atl. 806 (1929); *Gearhart v. Des Moines Ry.*, 237 Iowa 213, 21 N.W.2d 569 (1946); *Pickering v. Peskind*, 43 Ohio App. 401, 183 N.E. 301 (1930); *Conlon v. John Hancock Mut. Life Ins. Co.*, 56 R.I. 88, 183 Atl. 850 (1936); *Hill v. National Life & Acc. Ins. Co.*, 11 Tenn. App. 33 (1929).

⁵ *E.g.*, *Branch v. Woulfe*, 300 Ill. App. 472, 21 N.E.2d 148 (1939) (record excluded because only one of two nurses produced); *Clayton v. Metropolitan Life Ins. Co.*, 96 Utah 331, 85 P.2d 819 (1938).

⁶ 6 WIGMORE, EVIDENCE § 1707 (3d ed. 1940).

⁷ See McCORMICK, EVIDENCE § 290 (1954); Hale, *Hospital Records as Evidence*, 14 So. CAL. L. REV. 99 (1941).

⁸ *Globe Indem. Co. v. Reinhart*, 152 Md. 439, 137 Atl. 43 (1927); see 6 WIGMORE, *op. cit. supra* note 6, § 1707; McCORMICK, *op. cit. supra* note 7, § 290.

⁹ *E.g.*, *United States v. Wescoat*, 49 F.2d 193 (4th Cir. 1931); *Whitaker v. Thornberry*, 306 Ky. 830, 209 S.W.2d 498 (1948); *Lund v. Olson*,

However, the reluctance of most courts¹⁰ to dispense with the requirement of calling each entrant has led a number of states to adopt legislation to remedy the situation, either in the form of the *Model Act*¹¹ or the *Uniform Business Records as Evidence Act*.¹² Such acts are intended to broaden the scope of admissibility of business records.¹³ Both the *Model Act* and the *Uniform Act* contain broad definitions of "business,"¹⁴ thereby allowing for the admissibility of hospital records.¹⁵ Also both acts eliminate the necessity of producing the numerous persons who may have had a part in the creation of the record.¹⁶

Although hospital records are generally admissible to prove clinical facts,¹⁷ a problem is presented when a record entry is based upon a statement by the patient as to the cause of the accident which resulted in his injury.¹⁸ It has been held¹⁹ that such information,

182 Minn. 204, 234 N.W. 310 (1931); *St. Louis v. Boston & Me. R.R.*, 83 N.H. 538, 145 Atl. 263 (1929) (record prepared by 31 nurses would have been admissible had it been verified by the record clerk).

¹⁰ *E.g.*, *National Life & Acc. Ins. Co. v. Threlkeld*, 189 Ark. 165, 70 S.W.2d 851 (1934) (identification of record by hospital custodian held to be insufficient); *Clayton v. Metropolitan Life Ins. Co.*, 96 Utah 331, 85 P.2d 819 (1938).

¹¹ *E.g.*, CONN. GEN. STAT. § 52-180 (1958); N.Y. CIV. PRAC. ACT § 374 (1962); see also Federal Business Records Act, 28 U.S.C. § 1732 (1959), as amended, 75 Stat. 413, 28 U.S.C.A. § 1732 (Supp. 1961), which was based upon the Model Act.

¹² *E.g.*, MINN. STAT. ANN. §§ 600.01-.04 (1945); OHIO REV. CODE § 2317.40 (Supp. 1962).

¹³ *Frampton v. Hartzell*, 179 Cal. App. 2d 771, 4 Cal. Rptr. 427 (1960); *Bethlehem-Sparrows Point Shipyard v. Scherpenisse*, 187 Md. 375, 50 A.2d 256 (1946).

¹⁴ The Model Act provides that "the term 'business' shall include every business, profession, occupation, and calling of every kind." The Uniform Act contains an even broader definition by adding "whether carried on for profit or not." Compare TEX. REV. STAT. art. 3737e (Supp. 1962), which incorporated the most important sections of both the Model Act and the Uniform Act.

¹⁵ *Case v. Vearrindy*, 339 Mich. 579, 64 N.W.2d 670 (1954) (construing a statute based upon the Model Act); *Roeder v. North Am. Life Ins. Co.*, 259 Minn. 168, 106 N.W.2d 624 (1960) (construing the Uniform Act).

¹⁶ *United States v. Olivo*, 278 F.2d 415 (3d Cir. 1960); *Lewis v. Woodland*, 101 Ohio App. 442, 140 N.E.2d 322 (1955).

¹⁷ See McCORMICK, *op. cit. supra* note 7, § 290.

¹⁸ The objection to a patient's statement as to how the accident occurred is not whether the statement was actually made, but whether it was in fact true.

¹⁹ *Cox v. State*, 3 N.Y.2d 693, 148 N.E.2d 879 (1958), where the plaintiff, an inmate in a state mental hospital, sought to introduce in evidence a record entry relating to the cause of an accident which was based upon a statement by another inmate. The entry was excluded because the inmate was under no business duty to relate such information. *Williams v. Alexander*, 309 N.Y. 283, 129 N.E.2d 417 (1955).

when imparted by persons not acting pursuant to a business duty, should be excluded as multiple hearsay.²⁰ The reason advanced for this holding is that there is no guarantee as to the truth of voluntary hearsay statements made by third persons not acting in the regular course of business.²¹ Other courts have held that when the record states the patient's version of how the accident occurred, its admissibility is dependent upon whether the entry was made within the scope of hospital business.²² Since the business of a hospital is to diagnose and treat the ailments of its patients, any entries containing statements not germane thereto are not made in the regular course of business.²³ Therefore, any self-serving statements relating to the cause of a patient's accident are inadmissible,²⁴ except to the extent that they are of aid in diagnosis or treatment.²⁵

Record entries containing a physician's diagnosis of a patient based upon observations and objective data are generally admissible in evidence.²⁶ However, when the record contains a diagnosis in

²⁰ When record entries are based upon statements made by third persons, the facts contained therein are neither within the personal knowledge of the entrant nor of the witness verifying the record; therefore such entries amount to hearsay on hearsay.

²¹ *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930), where a policeman's report was excluded because it was based upon information imparted by a bystander. This case was severely criticized in 5 WIGMORE, EVIDENCE § 1530(a) (3d ed. 1940).

²² *E.g.*, *Borucki v. MacKenzie Bros. Co.*, 125 Conn. 92, 3 A.2d 224 (1938); *Brown v. St. Paul City Ry.*, 241 Minn. 15, 62 N.W.2d 688 (1954).

²³ *Yellow Cab Co. v. Hicks*, 224 Md. 563, 168 A.2d 501 (1961), where the court held that in order to be admissible, "statements in a hospital record must be pathologically germane to the physical condition which caused the patient to go to the hospital." In *Commonwealth v. Harris*, 351 Pa. 385, 41 A.2d 688 (1945), where a Negro man was being tried for murder, a hospital record contained a statement by the deceased victim that he was shot by a white man. The court excluded the record saying, "It was really none of the physician's professional 'business' who shot the patient" and that neither the inquiry nor the answer was in the regular course of hospital business.

²⁴ *Scott v. James Gibbons Co.*, 192 Md. 319, 64 A.2d 117 (1949); *Gilligan v. International Paper Co.*, 24 N.J. 230, 131 A.2d 503 (1957); In *Green v. City of Cleveland*, 150 Ohio St. 441, 83 N.E.2d 63 (1948), a record entry stating that the patient fell off a street car and caught her heel was excluded because the statement had no relation to medical treatment.

²⁵ See *Watts v. Delaware Coach Co.*, 44 Del. 283, 58 A.2d 689 (1948), where the court held that the plaintiff's recorded statement that he twisted his ankle while walking along a sidewalk was pathologically germane to the injury, as it aided the physician in diagnosis. The court also noted that the statement was an admission by the plaintiff. *Lee v. Housing Authority*, 203 Md. 453, 101 A.2d 832 (1954), where an entry stating that the patient came to the hospital "after being burned when a gas stove exploded near her" was held to be a proper entry relating to the nature and cause of the injury which would aid the physician in treatment.

²⁶ *Washington Coca-Cola Bottling Works v. Tawney*, 233 F.2d 353

the form of an opinion, its admissibility is somewhat more dubious, for the opposing party is left without the opportunity of cross-examination on matters of a technical and perhaps conjectural nature. Accordingly, in a number of cases the record has been excluded where it contained diagnostic opinions as to the patient's condition or cause of illness.²⁷ This result has been based on the assumption that medical opinions, formulated from symptoms which are difficult of interpretation, lose the guaranty of trustworthiness which is required for the admissibility of hospital records.²⁸ A majority of the courts, however, have rejected this line of reasoning and will allow a doctor's opinion to be shown by the record as long as it meets the general tests of reliability.²⁹ A further hindrance to the presentation of opinion evidence is the qualification of the physician as an expert without his appearing in court. It has been suggested that this may be done by showing that the physician has been duly licensed or is employed by a reputable hospital.³⁰

North Carolina has no statute governing the admissibility of business records as evidence,³¹ but has resolved the problem on common law principles.³² The early cases involving the competency of regularly kept business records held that they could be received in evidence only if the entrant were dead.³³ Since that time, the North Carolina Supreme Court has adopted a more realistic rule, taking

(D.C. Cir. 1956) (record stated that glass fragments were discovered during a rectal examination of the patient); *D'Amato v. Johnston*, 140 Conn. 54, 97 A.2d 893 (1953) (it was doctor's opinion that the patient was intoxicated).

²⁷ *Lyles v. United States*, 254 F.2d 725 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 961 (1958) (psychiatric diagnosis was excluded); *New York Life Ins. Co. v. Taylor*, 147 F.2d 297 (D.C. Cir. 1945); *Knudsen v. Duffee-Freeman, Inc.*, 95 Ga. App. 872, 99 S.E.2d 370 (1957); *Young v. Liddington*, 50 Wash. 2d 78, 309 P.2d 761 (1957); *Keller v. Wonn*, 140 W. Va. 860, 87 S.E.2d 453 (1955).

²⁸ *New York Life Ins. Co. v. Taylor*, *supra* note 27 at 304.

²⁹ *E.g.*, *Thomas v. Hogan*, 308 F.2d 355 (4th Cir. 1962); *Buckminster's Estate v. Commissioner*, 147 F.2d 331 (2d Cir. 1944); *Allen v. St. Louis Pub. Serv. Co.*, 285 S.W.2d 663 (Mo. 1956); *People v. Kohlmeier*, 284 N.Y. 366, 31 N.E.2d 490 (1940); *McReynolds v. Howland*, 218 Ore. 566, 346 P.2d 127 (1959).

³⁰ See *Allen v. St. Louis Pub. Serv. Co.*, *supra* note 29; *Hale*, *supra* note 7, at 108. See also *Thomas v. Hogan*, *supra* note 29.

³¹ N.C. GEN. STAT. § 8-42 (1953), enacted in 1756, provides for the admission of book accounts under sixty dollars, but this statute is very limited and covers nothing that would not otherwise be admissible under the business records rule today.

³² See text accompanying note 3 *supra*.

³³ *Ray v. Castle*, 79 N.C. 580 (1878); *Sloan v. McDowell*, 75 N.C. 29 (1876); *Bland v. Warren*, 65 N.C. 372 (1871).

into account modern business conditions under which it would be impossible to attempt to produce every person involved in recording a particular transaction. Accordingly, the court under this more modern rule will admit business records in evidence if they are made in the regular course of business, contemporaneous with the transaction involved, and if they are authenticated by a witness who is familiar with such records and the manner in which they are made.³⁴

The *Sims*³⁵ case has removed any doubt as to the possibility of entering hospital records into evidence under North Carolina's liberal business records rule. The court held that although hospital records are hearsay when offered as primary evidence, they nevertheless may be admitted as business records once the proper foundation has been laid.³⁶ In reaching this conclusion, the court recognized that hospital records are probably more accurate than the independent recollection of the persons making them and that a motive for their falsification is lacking. Possibly the court's confidence in the reliability of regularly kept hospital records will lead to the admission of expert medical opinion incorporated in the record. This supposition is substantiated by the fact that the record in the principal case contained a number of diagnostic opinions which would have been admissible except for the physician-patient privilege.³⁷

Notwithstanding the reliability of hospital records, the court pointed out that any entries which are irrelevant or which amount to hearsay on hearsay should be excluded from jury consideration.³⁸ Although there was no limitation placed upon what was to be excluded as hearsay on hearsay, this should not be construed to include all record entries merely because they were not made upon the entrant's personal knowledge. The North Carolina Supreme Court has consistently held, with regard to business records, that an entrant's personal knowledge of a transaction recorded is unnecessary

³⁴ *Smith Builder's Supply, Inc. v. Dixon*, 246 N.C. 136, 97 S.E.2d 767 (1957); *Dairy & Ice Cream Supply Co. v. Gastonia Ice Cream Co.*, 232 N.C. 684, 61 S.E.2d 895 (1950); *State v. Lippard*, 223 N.C. 167, 25 S.E.2d 594 (1943); *Breneman Co. v. Cunningham*, 207 N.C. 77, 175 S.E. 829 (1934); *Fort Worth & D.C. Ry. v. Hegwood*, 198 N.C. 309, 151 S.E. 641 (1930); *Flowers v. Spears*, 190 N.C. 747, 130 S.E. 710 (1925); *Firemen's Ins. Co. v. Seaboard Air Line Ry.*, 138 N.C. 42, 50 S.E. 452 (1905).

³⁵ 257 N.C. 32, 125 S.E.2d 326 (1962).

³⁶ *Id.* at 35, 125 S.E.2d at 329.

³⁷ *Id.* at 39, 125 S.E.2d at 331.

³⁸ *Id.* at 35, 125 S.E.2d at 329.

so long as both the entrant and his informer are acting under a business duty.³⁹ The court's prohibition of multiple hearsay was obviously meant to exclude any extra-judicial statements made by a patient referring to the cause of his injury.⁴⁰

In view of the court's liberal opinion in the *Sims* case, it would seem that in the future the only obstacle preventing more frequent use of hospital records as evidence will be the physician-patient privilege. But, now that it is clear that such records may be admitted, perhaps the trial judge will closely examine them and not hesitate to exercise the discretion granted him to disclose the privileged communication "if in his opinion it is necessary to a proper administration of justice."⁴¹

S. EPES ROBINSON

Evidence—Physician-Patient Privilege—Compelling Disclosure of Privileged Information—Discretion of the Trial Judge

While at common law no privilege was recognized for communications between patient and physician,¹ North Carolina² and over thirty other states³ have by statute created such a privilege. The

³⁹ *E.g.*, *Breneman Co. v. Cunningham*, 207 N.C. 77, 175 S.E. 829 (1934); *Firemen's Ins. Co. v. Seaboard Air Line Ry.*, 138 N.C. 42, 50 S.E. 452 (1905), where record entries made by a train dispatcher based upon information obtained from a station agent 100 miles away were admissible to show the position of a train at a given time.

⁴⁰ See note 20 *supra*.

⁴¹ N.C. GEN. STAT. § 8-53 (1953), in addition to establishing the physician-patient privilege, provides that the trial judge may order the disclosure of such privileged communications in order to facilitate a proper administration of justice. This provision in the statute was enacted to provide against an injustice resulting from the suppression of evidence by the patient's claim of privilege. In *Sims*, the Supreme Court, recognizing the legislature's intended purpose in making this provision, cast considerable doubt upon the soundness of the trial judge's decision not to compel disclosure of the record.

¹ "If a surgeon was voluntarily to reveal these secrets, to be sure, he would be guilty of a breach of honor and of great indiscretion; but to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever." *The Duchess of Kingston's Trial*, 20 How. St. Trials 573 (1776). See also *Capps v. Lynch*, 253 N.C. 18, 116 S.E.2d 137 (1960); *State v. Martin*, 182 N.C. 846, 849, 109 S.E. 74, 76 (1921); STANSBURY, EVIDENCE § 63 (1946).

² N.C. GEN. STAT. § 8-53 (1953). North Carolina enacted its privilege statute in 1885 and it has remained in its original form, without amendment, to date. A similar statutory privilege is also provided for communications between clergymen and communicants. N.C. GEN. STAT. § 8-53.1 (Supp. 1961).

³ New York in 1828 became the first state to depart from the common-law rule and provide for the privilege. Since then over two-thirds of the states have enacted similar legislation. See 8 WIGMORE, EVIDENCE § 2380 n.5 (McNaughton rev. 1961) where these statutes are compiled and quoted.